

WISHA REGIONAL DIRECTIVE

WISHA Services

Department of Labor and Industries

2.05

INITIATING INSPECTIONS

Date Issued: July 30, 2003

I. Background

Most Washington employers are subject to Title 49.17 RCW, the Washington Industrial Safety and Health Act (WISHA). RCW 49.17.050(6) requires the Department to "provide for the frequency, method, and manner of the making of inspections of work places without advance notice." RCW 49.17.070 authorizes WISHA enforcement staff, "upon presentation of appropriate credentials to the owner, manager, operator, or agent in charge" of the work site, "to enter without delay and at all reasonable times the factory, plant, establishment, construction site, or other area, work place, or environment where work is performed by an employee of an employer." This statute also authorizes WISHA enforcement staff "to inspect, survey and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such work place and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein...."

Under the federal and state constitutions, a court-issued warrant may be necessary in order to conduct a particular WISHA inspection. Whether a warrant is required depends on the specific circumstances of the inspection. The WISHA Compliance Manual does not and cannot address every possible situation. Therefore, it follows the same general approach as that taken by federal OSHA's Field Inspection Reference Manual, indicating that "Unless the circumstances constitute a recognized exception to the warrant requirement (i.e., consent, third party consent, plain view, open field, or exigent circumstances) an employer has a right to require that the CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant." (WISHA Compliance Manual, II-B.5).¹

L&I has developed policies regarding entry, warrants, consent and related issues as they arise in the field. These policies generally exceed the requirements of applicable law. Thus, L&I policy may direct field staff to seek a warrant even where one is not required by law.

¹ Some of these examples are not actual "exceptions" to the warrant requirement. Rather, they are instances when a warrant simply is not required. For simplicity the Compliance Manual and this WISHA Regional Directive combine inspections that do not trigger the warrant requirement and those that trigger the requirement but for which an exception exists into a single group of "exceptions."

II. Scope and Application

This WISHA Regional Directive (WRD) provides guidance to WISHA enforcement staff initiating inspections for any reason. It supplements the policies found in the WISHA Compliance Manual and replaces all other instructions on this issue, whether formal or informal. This WRD will be reviewed not later than February 1, 2004, to determine whether it should be modified, repealed or left in place based on inspectors' experience in the field.

III. Compliance and Consultation Protocols

A. How should WISHA enforcement staff confirm consent when initiating an inspection?

1. When a WISHA inspector enters or approaches a worksite, he or she will identify the senior representative of the employer on the site (see II-B.4 of the WISHA Compliance Manual).
2. After presenting credentials to that individual, the inspector will inform the employer's representative of the purpose of the inspection, as well as the reason this work site has been selected for inspection. For example, the inspector might advise the representative, "I am here because I saw an individual on the roof who is not using fall protection."
3. The inspector will affirmatively ask for consent to continue the inspection in a manner that makes it clear that the request may be denied (by asking, for example, "May we continue?" or "Do you mind if we go ahead with the inspection?" or "Do you have any objection with us getting started with the inspection?" or "Is there any reason we can't proceed?").
4. Using complete and accurate quotations, the inspector will document the question and the employer's response in the inspection work notes, normally on the back of the opening conference checklist. If clear consent is not provided, the inspector will attempt to clarify the response. The inspector will not proceed with the inspection in the absence of clear and explicit consent from the employer's representative.

B. How should WISHA enforcement staff handle a refusal to permit the inspection?

As indicated in the WISHA Compliance Manual, WISHA staff will leave the premises to confer with the CSHO supervisor if the employer's representative refuses to permit entry. Inspectors must avoid any arguments regarding refusal. They must not threaten or attempt to intimidate the employer. Because such intimidation or perceived intimidation may be the result of tone or demeanor, WISHA staff will avoid any activity that could be construed as threatening, such as raising their voices or using a threatening tone or body language.

In addition to other guidance in the Manual, staff are expected to comply with the following:

1. If asked about WISHA's authority to conduct inspections, the inspector will explain that Washington law gives the Department the right to conduct unannounced inspections. The inspector must also mention that Department

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policy allows the employer to insist upon a warrant. This guidance applies even in those cases where the warrant is not strictly required.

2. If asked what will happen next or whether WISHA will pursue a warrant, the inspector will indicate that a warrant to conduct the inspection may be sought. The inspector will not make a definite statement that the warrant will be granted or even that one will be sought, such as, “If you make me, I’ll get a warrant” or “I know I can get a warrant.”
3. If asked whether a warrant request will be successful, the inspector will indicate that it is the court’s decision but that WISHA often is able to obtain warrants when requested. Again, the inspector will avoid any definite statement that a warrant will be sought or granted, but the inspector can say, for example, “If we decide to request a warrant, we will present our case to a judge, and the judge will decide whether to give us the warrant.”
4. Under no circumstances may the inspector suggest in any way that the employer will be penalized for having asked the inspector to obtain a warrant. If the employer raises the issue (for example, by saying something such as, “Well, sure I can make you get a warrant, but then you’ll just come back here with an attitude”), the inspector will make clear that there will be no such result (for example, by responding, “You are allowed to request a warrant, and I have no problem with you doing so. If I come back with a warrant, I’ll do a thorough inspection, just like I would if you let me in right now”).

The inspector should ask for all relevant information related to the denial of entry, for example, the name and title of the person who has refused to give consent. The inspector will record this information in the inspection work notes, normally on the back of the opening conference checklist.

C. How should WISHA staff handle situations where it is necessary to enter the property to make contact with the agent in charge?

1. In the absence of any type of “No Trespassing” sign, WISHA staff may enter an active worksite during normal working hours for the purpose of making contact with the agent in charge and seeking consent to continue. If possible, WISHA staff will initiate contact prior to entering any portion of the worksite not normally accessible to the public.
2. If the property is posted with a “No Trespassing” sign (whether directed to the general public, to WISHA, to L&I or to government agents in general), the sign will not by itself be considered a denial of entry.

Whenever he or she encounters such a “No Trespassing” sign, the inspector will record any relevant observations both in writing and by photograph (including a description of the property, any apparent violations and any visible activity) from outside the property. The inspector may then enter the property for the purpose of making contact with the agent in charge and obtaining consent to continue with an inspection if, in his or her judgment, it is reasonably safe to do so and at least one of the following conditions is true:

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- a. When the inspector has actual knowledge, based on past experience with the employer, that the employer does not intend the sign in question to constitute a denial of entry to WISHA inspectors.
 - b. When contact can be made with the employer or an employer representative on the site and unambiguous consent to enter can be obtained before crossing the property line.
 - c. When the sign obviously is not intended to exclude WISHA inspectors from the property (for example, a sign reading “Members Only” at a country club).
 - d. When an apparent violation constituting imminent danger is observed and the inspector must enter the site to have the violation immediately corrected (or to issue an order of immediate restraint).
3. **In all circumstances not covered by III(C)(2)(a) – (c) above, the inspector will contact his or her supervisor or other person with suitable authority before entering property marked with a no trespassing sign.** These circumstances include but are not limited to:
- a. When it is not clear whether the sign is intended to exclude WISHA inspectors or not, the inspector will contact his or her supervisor to determine whether or not to enter the property or take other action.
 - b. When any other circumstances exist that make it unclear whether or not entry onto the property may pose a hazard to the inspector’s safety, the inspector will contact his or her supervisor before entering the property.
- D. *Who will make decisions whether to obtain a warrant to continue the inspection when entry has been denied?*

Before requesting a warrant, the CSHO supervisor and/or regional compliance manager will consult with the Senior Program Manager for WISHA Policy and Technical Services (P&TS), the Program Manager for Consultation and Compliance (C&C) Services within WISHA P&TS, or one of the senior Safety and Health Specialists within C&C Services. In the event that it is not possible to immediately contact one of these individuals, the CSHO supervisor may choose to pursue a warrant as circumstances dictate.

Approved: _____
Michael A. Silverstein, M.D.
Assistant Director for WISHA Services

For further information about this or other WISHA Regional Directives, you may contact WISHA Policy & Technical Services at P.O. Box 44648, Olympia, WA 98504-4648 -- or by telephone at (360) 902-5503. You also may review policy information on the WISHA Website (<http://www.wa.gov/lni/wisha>).